already obtained order of Court to sell the same.

(3) The prayer for damages would be allowed and assessment of the damages would be dealt with by the SAR.

As regards the plaintiff's action against the 2nd defendant, I repeat the said action is dismissed with costs. The caveat lodged by the plaintiff over the said property should be removed. The order of Court giving leave to the 2nd defendant to proceed with the auction of the charged lands is still valid as it was obtained prior to the 1st defendant going into liquidation. The 2nd defendant is given liberty to apply to this Court for a new date to proceed with the public auction of the said property.

LLOYDS BANK PLC

v.

ANG CHENG HO QUARRY & 3 ORS.

HIGH COURT, KUCHING
DATUK CHONG SIEW FAI J.
SUIT NO. KG 487 OF 1987
31 DECEMBER 1992

PRACTICE AND PROCEDURE: Taxation of costs- Applicant claiming getting-up fee including brief fee for Counsel - Respondent claiming that suit was settled before action had been set down for trial - Whether applicant entitled to getting-up fee - Review by Judge - Principles applicable on review.

The applicant and the respondent were sued as principal and guarantor respectively under credit facilities granted by the plaintiff to the respondent. After the plaintiff had taken out an O. 14 application, the respondent settled the claim and the plaintiff withdrew the suit. The applicant applied for his costs of the action against the plaintiff and it was ordered that the respondent pay the applicant's costs of the action including costs occassioned by the plaintiffs application for summary judgment which was subsequently withdrawn.

A dispute arose as to the getting-up fees claimed by the applicant under Article 152 of the Bill of Costs with the respondent claiming that the item should be disallowed altogether or alternatively that the sum awarded should be reduced on the grounds that:

(a) no novel point of law or point requiring specialised knowledge of any particular field was involved,
(b) as the application was for sumary judgment, the applicant needed only raise a triable issue,
(c) the applicant did not present his case because of settlement,
(d) brief fee paid to Counsel in Singapore and time spent in consultation should not be considered at all.

Held:

[1] There was no limitation on the Court's power to review any decision of a taxing master, whether on quantum, fact or otherwise.

[2] From the nature of the action, the amount of claim involved, the averments and allegations disclosed and raised in the pleadings and

the affidavits filed under the application for judgment, the case cannot be regarded as altogether free from complexity and the item on Counsel's fee was rightly allowed.

[3] The contention of the instructing advocate respecting time and work put into research of law necessarily loses much of its force as some considerable part of the case on points of law were from Counsel in Singapore respecting which fees had already been included in the complained item of the bill.

[4] The costs as reviewed by the learned Registrar on Article 152 be reduced to RM18.000 and the allocateur be varied accordingly.

[Order accordingly]

Cases referred to:

Starlite Ceramic Industry Ltd. v. Hiap Huat Pottery [1973] 1 MLJ 146 ***(refd)***

Jackson v. Parker and Gurney Champion (5 November 1985 unreported) ***(refd)***

Thorne v. Thorne [1979] 1 WLR 659 ***(refd)***

Petroliam Nasional Bhd. (PETRONAS) & Anor. v. Cheah Kam Chiew [1987] 1 MLJ 25 SC ***(cit)***

Simpson Motor Sales (London) Ltd v. Hendon Corporation [1964] 3 AER 833 ***(cit)***

Cheah Theam Swee & Anor. v. Overseas Union Bank Ltd. & Ors. [1989] 1 CLJ 157/ [1989] 1 MLJ 426 @ 437 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 68(l)(c)

Rules of the High Court 1980, 0.14, 0.18 r. 19, 0.59 r. 36(4) Appendix 1, O. 70 r. 39

Rules of the Supreme Court, O. 62 r. 35(4), (UK)

Other sources referred to:

Halsbury's Laws of England 4th Ed. Vol. 37 paras. 757 - 850

For the first defendant / applicant - Y.S. Yap
For the third defendant / respondent - M.L. Lau

JUDGMENT

Chong Siew Fai J:

This is an application by the first defendant company for review of Article No. 152 of the third defendant's bill of costs taxed by the learned Registrar of the High Court. Particulars given under Article 152 of the bill are as follows:

> Taking instruction to defend, considering law and facts, attending on and corresponding with client, arranging to obtain reports or advice from M/s. Drew & Napier Advocates and Solicitors, Singapore on Singapore Law, making search at Company Registry, perusing pleadings, affidavits, general law and conduct of proceedings.

The item in Appendix 1 to 0. 59 of the Rules of the High Court 1980 relied on is item 26 which provides:

> Instructions for trial or hearing of any cause or matter whatever the mode of trial or hearing. Discretionary.

The "Note to items 26 and 27" in Appendix 1 states:

> These items are intended to cover the doing of any work, not otherwise provided for, necessarily or purposely done in preparing for a trial, hearing or appeal, or before a settlement of the matters in dispute, including -
>
> (a) taking instructions to sue, defend, counterclaim, or appeal, or for any pleading, particulars of pleading, affidavit, preliminary act or claim in a reference under O. 70, r. 39;
> (b) considering the facts and law;
> (c) attending on and corresponding with client;
> (d) interviewing and corresponding with witnesses and potential witnesses and taking proofs of their evidence;
> (e) ...
> (f) ...
> (g) ...
> (h) perusing pleadings, affidavits and other relevant documents;
> (i) ...
> (j) the general care and conduct of the proceedings.

The claim has sometimes been called "getting - up fee".

The relevant facts forming the background of the present review may be stated as follows:

> The plaintiff sued 4 defendants including the first defendant company and the third defendant for RM2,107,968.58 being amount owing under credit facilities granted to the first defendant guaranteed by the other defendants including the third defendant who also agreed to indemnify the plaintiff.
>
> The first defendant filed a defence denying liability.
>
> The third defendant also filed a defence which was subsequently amended denying liability and raising, *inter alia*, matters on exchange control, illegality, consent of Bank Negara Malaysia, money-lending, alleged variation of letter of offer by the plaintiff, rate of interest and so forth.

On 12 April 1988 the plaintiff took out an application under O. 14 and O. 18 r. 19 of the Rules of High Court 1980 for judgment against the first, second and third defendants. Various affidavits and documents as exhibits were filed on behalf of the plaintiff and various defendants. Eventually the application and the action were withdrawn with leave of Court because the first defendant had settled the plaintiffs claim, but the question of costs were left open with liberty to apply.

On 16 March 1990 the third defendant through his advocates, applied by notice of motion for his costs of the action and of the application for judgment to be paid by the plaintiff. On 9 July 1990, the learned Judge ordered the first defendant to pay the second and the third defendants costs of the action including costs occasioned by the plaintiffs application for judgment which was subsequently withdrawn for reason aforesaid. (A Sanderson Order as is normally called).

The third defendant therefore took out the notice of taxation of his Bill of Costs respecting which Article No. 152 is now for review.

Originally, the sum claimed under Article No. 152 was RM55,000. At the initial taxation, the learned Registrar allowed RM10,000. Upon review at the instance of the third defendant on 11 September 1991, she increased it by RM18.000 to RM28,000. (For reasons, see Encl. 121 Encl. A).

The first defendant, now applies for review by a Judge.

For the first defendant, it was contended that the item should be disallowed altogether. Having regard to the wide scope of item 26 and the note relating thereto as reproduced above, I reject the contention. Moreover, there are ample authorities allowing getting-up fees for works that were necessarily and properly done though the actions had not been set down for trial. See example *Starlite Ceramic Industry Ltd. v. Hiap Huat Pottery* [1973] 1MLJ 146 in which cases related to the point were also discussed.

Counsel for the first defendant also urged, obviously as an alternative, for the reduction of the sum RM28,000 awarded on the contentions that no novel point of law or point requiring specialised knowledge of any particular field was involved, that as the application was for summary judgment the third defendant needed only raise a triable issue on applicability of the Singapore banking law and/or the legal validity of the assignment, that, in any event, the third defendant did not present his case because of settlement, that the voluminous documents, unless pertinent, should not be taken into account and that brief fee paid to Counsel in Singapore and time spent in consultation should not be considered at all.

For the third defendant, it was contended that the award made in the proper exercise of discretion ought not to be disturbed, that the claim in the action was substantial (over RM2 million) that complex legal points on specialised knowledge of banking law was involved, Counsel fee expended was justified, documents were voluminous and that though the application for summary judgment did not proceed to full argument, preparation for the hearing was made.

As for review by a Judge, 0.59 r. 36(4) (similar to English RSC O. 62 r. 35(4)) provided that save for the qualification therein stated respecting the reception of further evidence and raising fresh ground of objection, the Judge may exercise all such powers and discretion as are vested in the Registrar in relation to the subject matter of the application. It has been the practice developed through numerous cases that in matters respecting which the taxing officer has a discretion, the awards should not be interfered with unless he has gone on some wrong principle, or his decision is plainly wrong, or for some other reason similar to those which will induce an appellate Court to interfere with the discretion of a Judge of the first instance e.g. that matters that ought but was not taken into account (see further **Halsbury's Laws of England** 4th Ed. Vol. 37 paras. 757 - 850). However, in a recent case of *Jackson v. Parker and Gurney Champion* (5 November 1985 unreported) the English Court of Appeal (per Balcombe J.) expressed that the above approach of allowing review on limited circumstances some of which are described above, no longer represented the modern approach, and that there was no limitation on the Court's power to review any decision of a taxing master, whether on quantum, fact or otherwise. In an earlier case of Thome v. Thome [1979] 1 WLR 659 observation was made along this vein when Comyn J. after considering the 3 cases therein cited, spoke of:

> a rather clearer principle than they enunciate, and a definite one, that a taxation certificate can be set aside where the Court thinks it right and proper in all the circumstances to do so (p. 666).

Petroliam Nasional Bhd. (PETRONAS) & Anor. v. Cheah Kam Chiew [1987] 1MLJ 25 SC cited by Counsel for the third defendant is in a different perspective. It was an appeal from the decision of the High Court to the Supreme Court. Different considerations e.g. Section 68(l)(c) of the Courts of Judicature Act 1964 applied. Moreover, it seems to deal with the award of costs generally rather than on a specific item as in our instant case.

As to Counsel fee in Singapore, the amount at stake in this action was substantial. It was not disputed that Singapore law was, at least to some extent, involved.

Learned Counsel for first defendant has not persuaded me as to why services or advice of Counsel in Singapore was unnecessary or why there was no justification for the allowance of such fee on a party and party taxation. The question, in my view, is whether a prudent man would have proceeded without opinion or advice of Counsel. From the nature of the action, the amount of claim involved, the averments and allegations disclosed and raised in the pleadings and the affidavits filed under the application for judgment and that the law of Singapore was involved, I do not think the case can safely be regarded as altogether free from complexity. In my view the item (as opposed to quantum) was rightly allowed.

As regards the quantum of Counsel's fee, advocate for the first defendant cited *Simpson Motor Sales (London) Ltd v. Hendon Corporation* [1964] 3 AER 833 that a proper measure for such fee would be such as acceptable to a hypothetical Counsel capable of conducting the case effectively but unable or unwilling to insist on the particularly high fee sometimes demanded by Counsel of pre-eminent reputation. It is, of course, not a sound principle on taxation *inter partes* to treat the fee paid by the other party as a yardstick. In any given case it is for the Judge using his knowledge and experience to determine what the proper figure is. In the instant case Counsel fee was about S$8,290 inclusive of outlays. I am not persuaded that amount is so unreasonably high as to warrant interference. Indeed the argument in this respect for the first defendant was for total disallowance.

I agree with Counsel for the first defendant that in an Order 14 application, a defendant need only show the existence of a triable issue. However, since the action had been commenced, I fail to see why a conscientious advocate for the defence should be precluded from preparing his client's case in greater depth to enhance chances of success in the application as well as for the action particularly that pleadings, as in the instant case, had closed. Furthermore, it is, I think, not inappropriate to note that the third defendant had to be involved in the action to the stage as had actually attained because of the first defendant's delay in effecting settlement. Had the first defendant settled the claim at the outset, the third defendant would have been spared from the predicament.

There remains the balance of the quantum (i.e. RM28,000 less Singapore Counsel's fee) to consider. For the third defendant, Counsel argued that research had to be made respecting points of law involving specialized knowledge of banking law and voluminous documents were filed. Normally the extent to which research needs to be made depends largely on the complicity of the issues and the experience of an advocate. In the instant case, however, it is fair to assume that some considerable part of the case on points of law were from Counsel in Singapore respecting which fee had already been included in the complained item of the bill and had been dealt with in the earlier part of this judgment. In the circumstance, contention of the instructing advocate respecting time and work put into the research of law necessarily loses much of its force. There is also some justification in the complaint that unnecessary or irrelevant materials were filed or exhibited e.g. opinion of Counsel. *Cheah Theam Swee & Anor. v. Overseas Union Bank Ltd. & Ors.* [1989] 1 MLJ 426 @ 437. Though, generally speaking, the discretion of the taxing officer on quantum will not be interfered with, however, in view of the above irregularities and after hearing submissions of Counsel, a reduction from the amount of RM28,000 for the item is, in my opinion, justified. On the materials available and doing the best I can, I consider a sum of RM18,000 for the item fair and reasonable. The costs as reviewed by the learned Registrar on Article 152 be reduced to RM18.000 and the allocatur be varied accordingly.

There remains the question of interest. Counsel for the third defendant urged that interest be given for the taxed costs from 11 September 1991 (date of review by the learned Registrar). I do not think interest ought to be awarded in this case. Article 152 had all the time been in dispute. The amount thereunder therefore had not been finalised. As regards the balance of the taxed costs, it had not been challenged at all and the third defendant could have demanded or enforced payment thereof.

On the facts and circumstances of this case and since the amount under the Article 152 has been reduced but not to extent of that reviewed by the learned Registrar, in the exercise of the discretion of the Court I make no order as to costs of this review before me.

In short, the amount under Article 152 is reduced from RM28,000 to RM18.000 and there be no costs as to this review.

PUBLIC PROSECUTOR

v.

LEE SOON SIAN

HIGH COURT, TAIPING
DATO' HJ. ABDUL MALIK B.
HJ. ISHAK JC
[CRIMINAL TRIAL NO. 58-7-92 (90)
26 DECEMBER 1992]

DANGEROUS DRUGS: Trafficking in opium - Drugs found in blue cloth bag across carrier of motor cycle ridden by accused - Identity of exhibits produced in Court - Whether break in chain of evidence.

SEARCH LIST: Incriminating exhibits listed in search list - Accused signed on search list - Question of caution - Whether signature of accused on search list amounts to confession or mere acknowledgment of receipt of copy of search list - Legal obligation on part of raiding party to prepare and deliver search list under s. 64 Criminal Procedure Code - Whether failure to prepare or produce search list by itself would entitle accused to an acquittal or cast doubt on bona fides of parties conducting search

CAUTIONED STATEMENT: Defence sought to tender carbon copy of cautioned statement during prosecution case through Investigation Officer - Whether carbon copy of cautioned statement admissible - Sections 62,63 and 65 Evidence Act 1950.

EXHIBITS: Fingerprint - Negative fingerprint report in regard to exhibits - Whether knowledge on part of accused in regard to drugs diminished.

The Accused was charged for trafficking in dangerous drugs, to wit "raw opium" (candu mentah) on 13 February 1990 at about 3.15 pm di kawasan kebun ubi, near 40 km, Jalan Ipoh/ Kuala Kangsar, Sungai Siput, an offence under s. 39B(l)(a) of the Dangerous Drugs Act 1952 (Act 234) and punishable under s. 39B(2) of the same Act.

Held:

[1] On all the evidence before the Court, sufficient reasonable doubt had been cast by the defence during the prosecution case itself as to the knowledge and possession of 16.735 kilogrammes of raw opium by the Accused. The prosecution had failed to establish a *prima facie* case which, if unrebutted, would warrant the conviction of the Accused.